

Henry P. Roybal
Commissioner, District 1

Anna Hansen
Commissioner, District 2

Rudy N. Garcia
Commissioner, District 3



Anna T. Hamilton
Commissioner, District 4

Ed Moreno
Commissioner, District 5

Katherine Miller
County Manager

MEMORANDUM

DATE: March 25, 2019

TO: Board of County Commissioners

FROM: Michael Kelley, Public Works Department Director MK 3/27/19

VIA: Katherine Miller, County Manager

ITEM AND ISSUE: BCC Meeting April 9, 2019

**COMMUNITY WATER SYSTEM ACQUISITION AGREEMENT HYDE PARK ESTATES
(Utilities Division/John Dupuis)**

SUMMARY:

This proposed Community Water System Acquisition Agreement Hyde Park Estates (Agreement) between Santa Fe County (County) and Hyde Park Estates (HPE) allows for the conveyance from HPE to the County of certain assets of the community water system for the County to acquire, own, operate, and maintain. Upon Board of County Commissioners' approval, the Members of the HPE Association will (at a future date) hold an election to vote to become customers of the County Utility.

BACKGROUND:

The governing board of the HPE Association resolved to convey the HPE water system to SFC at the board's meeting of September 20, 2012. Since that time SFC has worked diligently with HPE to create and begin the execution of a process for SFCU to receive the water system.

DISCUSSION:

A study performed in 2018 has shown that the transfer of the HPE water system to SFC will result in a burden being placed on SFC and as a result HPE customers will pay a monthly surcharge of \$36.24 for a 15 year period in compensation to SFC for that burden.

ACTION REQUESTED:

Approval of the Community Water System Acquisition Agreement Hyde Park Estates between the County and HPE.

Attachment: Community Water System Acquisition Agreement Hyde Park Estates

**COMMUNITY WATER SYSTEM ACQUISITION AGREEMENT
HYDE PARK ESTATES**

This Community Water System Acquisition Agreement ("Agreement"), effective as of the last date of signature written below ("Effective Date"), is entered into between **Santa Fe County** ("County"), a political subdivision of the State of New Mexico, and the **Hyde Park Estates Cooperative Domestic Water Association** ("the Association"), a New Mexico domestic cooperative. The County and the Association may hereinafter be referred to as "Parties," collectively, and a "Party," singularly.

RECITALS

WHEREAS, the Association was formed under the New Mexico Cooperative Association Act, NMSA 1978, Sections 53-4-1 through 53-4-45, and owns, operates and maintains a community water system ("Water System" or "System") that provides water service to residents of Hyde Park Estates, a County subdivision; and

WHEREAS, the Board of County Commissioners adopted Resolution No. 2013-66 regarding County acquisition of the Water System; and

WHEREAS, the Association's water service area is shown on Exhibit A to this Agreement; and

WHEREAS, the governing board of the Association resolved to convey the Water System to the County at the board's meeting of September 20, 2012; and

WHEREAS, the Association represents that its members have duly approved this Agreement and desire to become customers of the County water utility ("County Utility") in accordance with the term of this Agreement; and

WHEREAS, the Association desires to convey and the County desires to acquire the property interests, contractual rights, infrastructure, equipment and documents owned or held by the Association in connection with the Water System and identified in this Agreement ("Assets"), *excepting* the items expressly excluded from this Agreement under Section 1.4 below and Exhibit C.

AGREEMENT

NOW THEREFORE, for valuable consideration, the sufficiency of which is hereby acknowledged, the County and the Association agree as follows:

ARTICLE 1
The Transaction

1.1 Incorporation of Recitals and Definitions.

The Recitals set forth above are incorporated herein by reference and are a part of this Agreement. Capitalized terms in the text of this Agreement have the meaning provided in this Agreement.

1.2 Conveyance of Assets and Conditions of County Water Service

On the Closing Date, the Association shall convey and deliver the Assets to the County through execution and delivery of appropriate deeds, assignments, bills of sale, or other forms of conveyance acceptable to the County; and the County shall accept and thereafter own, operate, and maintain the Assets subject to the terms and conditions of this Agreement and the County ordinances, resolutions, and policies of the County, as the same may be amended from time to time, applicable to County water service.

Except as otherwise provided in this Agreement, the Association will convey the Assets to the County in an "AS-IS" and "WHERE-IS" condition, including existing environmental conditions, operating conditions, and conditions of repair.

Upon conveyance to and acceptance by the County, the Assets shall automatically be incorporated into the County Utility and thereafter owned, operated, and maintained by the County as part of the Utility, and the residents of Hyde Park Estates may thereafter become customers of the County Utility in accordance with subject to this Agreement and all County ordinances, resolutions, and policies concerning County water service.

In addition to limitations imposed by physical water supplies and the terms and conditions of the County's water rights and permits, County water service is subject to various agreements between the County and the City of Santa Fe ("City"), including but not limited to the *Joint Powers Agreement between the City and the County Governing the Buckman Direct Diversion Project*, as amended, the *Amended and Restated Water Resources Agreement Between the City and the County*, and the *City and County Agreement Regarding Water and Wastewater Service for Agua Fria, Hyde Park, High Summit, and Cloudstone*.

In accordance with County Resolution No. 2006-57, upon conveyance of the Assets to and acceptance by the County, the total amount of water use per primary dwelling unit (including any accessory dwelling or guest house) shall not exceed 0.25 acre-feet per year.

The parties to this Agreement ("Parties") acknowledge that the Assets do not meet current County Utility standards regarding level of service or fire protection. The County will provide service only at the level of service that the Association currently provides, including fire protection, and the County has no obligation to increase the level of service or to upgrade the Assets to meet current County standards.

1.3 Description and Estimated Value of Assets

a) The total estimated “as is” value of the Assets (which excludes all of the Association’s water rights, water wells, well houses, and other infrastructure relating to the operation of the water wells) was estimated to be \$120,624.68 in 2014,¹ which is the sum of the estimated value of the useable infrastructure (\$96,574.68) and salvage value (\$24,050.00).

b) The Assets to be conveyed under this Agreement shall include all of the items listed on Exhibit B. In addition to the items specifically listed on Exhibit B, and subject to Sections 1.4 and 1.5 of this Agreement, the Association shall convey all of the Association’s right, title, and interest in and to any and all real and personal property, easements and rights-of-way, pipes and pumps, tangible and intangible rights and property, documents, infrastructure, and equipment of any kind or nature whatsoever that is or may be necessary or appropriate to lawfully and efficiently operate, maintain, repair and replace the infrastructure and equipment comprising the Assets. The Assets to be conveyed under this Agreement (exclusive of all the Association’s water rights, water wells, well houses, and other infrastructure relating to the operation of the water wells) shall include the following:

(1) all water storage tanks, water distribution towers, pumping stations, control houses, conduits, control stations, pumps, pipeline, booster pumps, water lines, water mains, service lines, distribution lines and facilities, meters, isolation valves, curb boxes, curb stops services lines, public fire hydrants, valves, fittings, back flow preventers, and all appurtenances thereto;

(2) all equipment, machinery, vehicles, tools, motors, spare parts, materials, chemicals, supplies, fixtures and improvements, construction in progress, jigs, molds, patterns, gauges, production fixtures, office equipment, computer systems, and telephone systems;

(3) all information, books, records, ledgers, files, documents, correspondence, data, plans, models, system maps, engineering records mylars, planning, studies, architectural plans, drawings and specifications customer records and data, supplier lists, records of operations, quality control records and procedures, equipment maintenance records, manual and warranty information, laboratory books, goodwill (including, to the extent transferable, any licenses and sub-licenses granted or obtained with respect thereto), and inspection protocols or procedures; and

(4) any and all easements, including prescriptive easements, and other property but excluding any and all easements or other property interests that relate solely to the Association’s water wells and are not needed to lawfully access the Assets conveyed under this Agreement.

¹ This valuation estimate is taken from a Valuation Report, dated February 2014, completed by Santa Fe Engineering Consultants, LLC. This valuation does not take into account costs to remedy infrastructure deficiencies, if any, such as booster system, system pressures, and fire protection.

1.4 Excluded Assets

The Assets to be conveyed under this Agreement shall not include the property listed on Exhibit C.

1.5 Assumption of Contracts

On the Closing Date, the Association shall assign and the County shall thereafter assume only those contracts of the Association listed on Exhibit D ("Assumed Contracts"); *provided*, however, that the County shall not assume or be liable for any breach of or nonpayment under any Assumed Contract that arose or occurred on or before the Closing Date.

1.6 Assumption, Retention and Discharge of Liabilities

a) In connection with its acquisition of the Assets, the County shall only assume those obligations and liabilities that arise on or after the Closing Date and that relate to the County's ongoing operation and maintenance of the Assets on or after the Closing Date ("Assumed Liabilities").

b) Other than the Assumed Liabilities, the Association shall retain, and the County shall not assume or otherwise be liable for, any liabilities, claims, contracts or obligations of any nature whatsoever, whether known or unknown, absolute, accrued, contingent or otherwise concerning the Association or the Assets that arose before the Closing Date (collectively, "Retained Liabilities"), even if those liabilities, claims, contracts or obligations are not discovered or discoverable until after the Closing Date. The Association's Retained Liabilities shall include but are not necessarily limited to: (1) all amounts owed to the City of Santa Fe (the "City") for delivery of water up to and including the Closing Date; (2) all amounts owed for utilities on or before the Closing Date; (3) all amounts owed to contractors, employees or any other person, company or other entity who supplied goods or services to the Association on or before the Closing Date; (4) any obligation or liability relating to the water wells, pumps houses and related infrastructure; and (5) any trespass or other legal actions or claims that accrued on or before the Closing Date.

1.7 Dedicated Account; Post-Closing Obligations; Reimbursement.

a) **Dedicated Account.** On or before the Closing Date, the County shall establish an account or otherwise dedicate \$30,000 ("Dedicated Account") for the purpose of reimbursing the Association for the costs it incurs in paying qualified and properly licensed third parties to timely perform the post-closing obligations identified in Section 1.7(b).

b) **Post-Closing Obligations.** Within one hundred twenty (120) days after the Closing Date, unless otherwise agreed upon in writing by both parties, the Association shall perform the following obligations using qualified and properly licensed third parties:

(1) The Association shall decommission and completely and permanently disconnect all of the Association's water wells, including the Grey Wolf and Gusher Wells, from the Assets conveyed to the County.

(2) The Association shall plug and abandon its retained water wells; *provided*, however, that this post-closing obligation shall only apply to the extent the Association intends to seek reimbursement from the County under this Agreement for the actual costs of such plugging and abandonment.

c) **Reimbursement.** The Association shall be entitled to reimbursement solely from the Dedicated Account for the actual costs it incurred in complying Section 1.7(b); *provided*, however, that the Association must submit copies of paid invoice(s) to the County within one hundred and twenty (120) days after the Closing Date in order to receive reimbursement; and *provided* further that the total reimbursement to the Association shall not exceed \$30,000.00. Any amounts remaining in the Dedicated Account in excess of that needed to reimburse the Association for its actual expenses, based on timely submitted invoices, shall be reallocated to other County funds as the County deems appropriate.

1.8 Proration of Expenses

All ongoing Water System operating expenses and charges shall be calculated and divided between the Parties on a prorated basis, with the Association paying the expenses up to and including the Closing Date and the County paying the expenses thereafter. Such expenses may include but are not necessarily limited to electric, fuel, gas, telephone, water (including the water bill from the City), other utility charges, rentals, and any charges under the Assumed Contracts. Pursuant to this Section and Section 3.1(B), if after the Closing Date a Party receives a bill for which the other Party is wholly or partly responsible for paying, that Party shall promptly provide notice and a copy of the bill to the other Party. The Parties shall thereafter agree on the appropriate prorated allocation, as provided in this Agreement, and timely pay their respective allocations directly to the vender. In addition, the Parties shall notify the service provider to send future bills, if any, to the County Utility.

1.9 Closing Date and Location.

The Association shall convey and the County shall accept the Assets pursuant to this Agreement within ninety (90) days after the Effective Date ("Closing Date"), unless otherwise agreed by the Parties in writing; *provided*, however, that the Closing Date shall occur no later than the first anniversary of the Effective Date. The Closing Date shall occur on or as close as practicable to the last day of the meter reading/billing cycle of the Association. The Parties shall select a mutually acceptable closing location.

1.10 Association Deliverables.

On the Closing Date, the Association shall deliver to the County such deeds, assignments, and other instruments, in forms acceptable to the County Attorney, as may be necessary to assure that the County will have valid and sufficient rights, title and interest to lawfully operate,

maintain, repair and replace the Assets, in perpetuity, including but not limited to the following documents:

- a) fully executed warranty deed(s) granting fee interests in real property and appurtenances thereto, if any, included in the Assets;
- b) fully executed assignment(s) of all easements, rights-of-way, permits, licenses, and any other instruments that provide valid legal access to the Assets;
- c) a fully executed bill of sale or other appropriate conveyance(s) for all infrastructure, equipment and other personal property included in the Assets;
- d) fully executed assignments of all Assumed Contracts, permits, licenses, and any other rights, privileges and approvals that pertain to the Assets;
- e) a fully executed County Utilities Division Hyde Park Estates Service Application² ("County Water Service Application" or "County Application") for each Association customer who desires water service from the County Utility, along with a \$15.00 deposit for each executed Application;
- f) an affidavit executed by the Association Chair stating under oath that the Association provided each of its existing customers a copy of this executed Agreement, a copy of the County Water Service Application, and written notice of the following: (1) that the County will acquire the Assets contingent on the terms and conditions of this Agreement; (2) that the County will be the exclusive provider of water service after the Closing Date; (3) that customers desiring water service from the County Utility must complete and submit a County Water Service Application before the Closing Date; and that (4) the water service of any Association customer who does not submit a County Application before the Closing Date will be discontinued after the Closing Date.
- g) all other documents required by this Agreement, including the certificates and resolutions required by Section 4.1(d), the updated meter reading information required under Section 3.2(g), and any other conveyances or documents that the County Attorney reasonably determines are required to assure that the County receives good and marketable title to the Assets;
- h) all existing drawings, plans, plats, and as-built drawings describing the Assets;
and
- i) executed easements in the form of Exhibit E from the owners of the parcels within Hyde Park Estates identified in Exhibit F; *provided*, however, that no easement shall be required from such owners who, before the Closing Date, move their meters into an existing street right-of-way or other area to which the Association has clear and sufficient legal access.

² The County will provide this form.

1.11 County Deliverables

On or before the Closing Date, the County shall create the Dedicated Account in the amount of \$30,000.00, as described in Section 1.7.

ARTICLE 2

Representations and Warranties

2.1 Representations and Warranties of the Association.

The Association represents and warrants to the County, as follows:

- a) Organization and Good Standing. The Association is a domestic cooperative, duly organized and in good standing under the laws of the State of New Mexico.
- b) Authority. The Association's signatory below has express and irrevocable authority to execute this Agreement on behalf of the Association, and the Association has authority to fully perform all of its obligations under this Agreement.
- c) Non-Contravention. The Association's performance of this Agreement does not (i) require any further approvals or consents from any other party; (ii) violate any law, ordinance or regulation; or (iii) conflict with or result in a breach of, or constitute a default under, any contract, lease, permit or other agreement or commitment to which the Association is a party.
- d) No Pending or Threatened Litigation or Proceeding. To the best of the Association's knowledge, there is no legal or administrative action pending or threatened against the Association, including no pending or threatened complaint, claim, litigation, arbitration, proceeding, investigation, judgment, injunction, penalty assessment, notice of violation, permit revocation, cancellation or suspension, or audit of any kind.
- e) Permits and Compliance with Law. To the best of the Association's knowledge, the Assets comply with all applicable federal, state, and local laws, regulations, codes and any applicable court and administrative agency judgments and orders; all required permits are in good standing and in full force and effect; and the Association shall maintain the Assets in such compliance until the Closing Date.
- f) Title to Real Property and Encumbrances. As of the Closing Date, the Association shall have and be able to convey good and marketable title to all of the real property to be conveyed under this Agreement, free and clear of any and all mortgages, liens and all other security interests, subject only to matters of record acceptable to the County.
- g) Contracts. To the best of the Association's knowledge, the Assumed Contracts, if any, are valid and enforceable in accordance with their terms.

h) Customer Advances. The Association shall not have on deposit or otherwise in its possession any unexpended customer advances, nor shall there be any unfinished water facilities or other capital construction projects pending at the time of Closing.

i) Condition of Assets. To the best of the Association's knowledge, subject to the disclaimer set forth in Section 1.2 above, all of the buildings, machinery, equipment, tools, furniture, improvements and other tangible property included in the Assets are in working condition, normal wear and tear excepted.

j) Environmental Matters.

(i) To the best of the Association's knowledge, the Association has not disposed of or arranged for the disposal of or released any regulated hazardous substances in, on, or under any real property included in the Assets.

(ii) The Association has not been identified as or alleged to be a potentially liable or responsible party under any federal or state environmental law, including but not limited to the Federal Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") and the New Mexico Hazardous Waste Act.

(iii) No real property included in the Assets has been used for the storage, treatment, generation, processing, production, or disposal of any hazardous substances or as a landfill or other waste disposal site.

(iv) No underground storage tanks are included in the Assets.

(v) There are no pending or unresolved claims against the Association or the Assets for investigatory costs, clean-up, removal, remedial or response costs, or natural resource damages arising out of any releases or threat of release of any hazardous substance.

(vi) This Section 2.1 contains the sole and exclusive representations and warranties of the Association with respect to any matters arising under or related to any environmental, health and safety requests, regulated substances and environmental conditions.

k) Legal Access. As of the Closing Date, the Association shall possess and convey free and clear legal access to all of the Assets.

2.2 Representations and Warranties of the County

The County represents and warrants to the Association as follows:

a) Authorization and Enforceability. The County has the full power and lawful authority to execute this Agreement and to perform its obligations contemplated hereby and has duly and validly authorized the execution of this Agreement (including such other necessary agreements, instruments and documents in connection herewith) and all necessary proceedings.

b) Non-contravention. The County's performance of its obligations contemplated hereby, as of the Closing Date, shall not (i) require any further approvals or consents from any other party; (ii) violate any law, ordinance or regulation; and (iii) conflict with or result in a breach of any contract, lease or permit to which the County is a party.

c) No Pending Litigation or Proceedings. To the best of the County's knowledge, there is no claim, litigation, arbitration, proceeding, judgment, injunction, audit or governmental investigation pending or threatened against the County which could reasonably be expected to prevent the County from performing this Agreement.

d) Condition of Assets. Except as otherwise provided in this Agreement, the County is receiving the Assets in their "AS-IS" condition, including their environmental condition, operating condition and condition of repair, and is not relying on any representation of the Association in connection therewith except for representations and warranties contained in this Agreement.

ARTICLE 3

Covenants

3.1 Mutual Covenants of the Association and the County

The Parties mutually covenant and agree that, except as otherwise approved by the other party in advance and in writing:

a) Cooperation. The Parties shall cooperate and shall cause their respective officers, employees, agents and representatives to cooperate to ensure the orderly transition of the Assets from the Association to the County and to minimize any disruption to the customers of the Water System from the transactions contemplated by this Agreement.

b) Further Assurances. For a period of one year after the Closing Date, the Parties shall continue to mutually cooperate and, as necessary, execute and deliver such additional instruments and take such additional actions as may reasonably be requested by either Party to fully perform this Agreement. Such actions may include but are not limited to (i) perfecting the transfer of the Assets to the County; (ii) assisting in the preparation of tax returns, audits, or examination by any governmental or taxing authority in connection with the Water System; and (iii) payment of any outstanding prorated bills.

c) Expenses. The Parties shall each bear their own respective accounting, legal and other expenses incurred in connection with the transactions contemplated by this Agreement.

d) Billing of Transferred Services. The Association is responsible for billing and collecting payments from its customers up to the Closing Date. Fifteen days prior to the Closing Date, the Association shall provide the County with the previous year's usage amount for each customer. After the Closing Date, the Association shall provide to the County all the final meter readings on which the Association's final customer bills are based. In the first billing cycle

following the Closing Date, the County will issue estimated bills to each customer, based upon the customer's usage for the same time period in the previous year. In the 30 days following the Closing Date, the County will establish customer accounts and service customer meters (as the need is determined by the County). For the second billing cycle after the Closing Date and thereafter, the County will issue customer bills based upon actual customer meter readings in accordance with the County's policies.

e) Payment of Outstanding City Water Bills. As provided in Section 1.8, the Association shall pay for water service from the City up to and including the Closing Date and the County shall be responsible for paying for City water service thereafter.

f) System Acquisition Surcharge. As a condition of County water service, the County will add a monthly system acquisition surcharge of \$36.24 to the bills of customers served by the Water System; *provided*, however, that the surcharge shall be discontinued fifteen (15) years after the Closing Date. The purpose of the surcharge is to cover the depreciation of the Water System described in the Valuation Report, dated February 2014, completed by Santa Fe Engineering Consultants, LLC, and other operational costs.

g) Brokerage. Neither the Association nor the County is liable for any broker's or finder's fees in connection with the transaction governed by this Agreement.

3.2 Covenants of the Association

The Association hereby covenants and agrees that, except as otherwise approved in advance in writing by the County:

a) Continuation of Business. The Association shall operate the Water System until the Closing Date of the Water System in the ordinary course of business, consistent with past practice, so as to preserve (i) its business organization intact until formal dissolution; and (ii) the relationship of the Water System with suppliers, customers and others including the City.

b) Continuation of Insurance. The Association shall maintain in existence policies of insurance insuring the Assets against liability and property damage, fire and other casualty up to the Closing Date and maintain tail policies on liability for a period of one (1) year after the Closing Date.

c) Access to Records. The Association shall (i) give to the County and its representatives, from the date first written above until the Closing Date, full access during normal business hours, upon reasonable notice, to all the properties, books, data, contracts, agreements, documents and records connected to the Assets; and, (ii) make available to the County and its representatives all other information with respect to the Assets and/or the business and affairs of the Association as the County may reasonably request; provided, however, such access may be scheduled so as to not unreasonably interfere with the Association's operation of the Water System.

d) Projects in Progress. The Association represents that there are no capital improvements and/or studies in progress and that there will be no such improvements or studies in progress on the Closing Date.

e) Third-Party Approvals. The Association shall use its best efforts and diligently pursue all legally required any governmental or other third-party approvals, authorizations, consents, permits, and other written authorizations that may be required, if any, for Association to lawfully convey the Assets to the County as of the Closing Date.

f) Meter Reading Information. Fifteen days prior to the Closing Date, the Association shall provide the County with a complete list of current customers and designated future customer accounts, including names, service addresses, billing addresses, meter sizes and meter serial numbers in meter reading route sequence. The Association shall provide advance notice to the County of the Association's final meter readings before the Closing Date so that County staff may have a reasonable opportunity to accompany Association staff during the final meter readings, if desired.

g) No Dissolution for One Year. The Association shall remain a lawfully incorporated association and shall not dissolve or otherwise disassociate for at least one (1) year following the Closing Date; *provided*, however, that the Association shall not dissolve, if at all, until it has fully performed all of its obligations under this Agreement, including Section 8.17 below.

3.3 Covenants of the County

The County shall use its best efforts and diligently pursue all legally required governmental or other third-party approvals, authorizations, consents, permits, and any other written authorizations that may be required, if any, for the County to lawfully accept the Assets as of the Closing Date.

3.4 County Water Service Charges

The County shall charge former Association water customers, including their successors and assigns, the System Acquisition Surcharge set forth in Section 3.1(f) above and, in accordance with the ordinances, resolutions, and policies generally applicable to County water service, as the same may be amended from time to time.

ARTICLE 4

Conditions Precedent

4.1 Conditions Precedent and Subsequent to the County's Obligations

The obligations of the County to consummate the transactions contemplated by this Agreement is subject to the satisfaction, on or prior to the Closing Date, of each of the following conditions (any one or more of which may be waived in writing, in whole or in part by the County, in its sole discretion):

a) Representations and Warranties. The Association's representations and warranties contained in this Agreement shall be true in all material respects as of the Closing Date, except for changes in the ordinary course of business after the date first written above that are in conformity with the covenants, warranties, representations and agreements contained in this Agreement.

b) Performance of Agreements. The Association shall have performed and complied, in all material respects, with all covenants, agreements and conditions required by this Agreement to be performed, or complied with by it prior to or upon the Closing Date.

c) Adverse Change. There shall not be any material adverse change, occurrence or casualty, financial or otherwise, to the Assets, whether covered by insurance or not.

d) Certificates of the Association. The Association shall deliver to the County a certificate of the New Mexico Secretary of State certifying and attaching true and complete copies of the Articles of the Association as the same are in force on Closing Date and of the resolutions adopted by its governing board relating to this Agreement and the transactions contemplated hereby; and, certifying the incumbency of the officers of the Association executing this Agreement or any documents delivered hereunder.

e) Deliveries upon Conveyance and Further Cooperation. As of the Closing Date, the Association shall deliver to the County all of the fully-executed conveyance documents and other instruments necessary to provide the County free and clear legal access to the Assets, subject only to the express exceptions listed in this Agreement. To the extent the Association does not provide free and clear legal access to all of the Assets as of the Closing Date and the County agrees to close, the Association shall for a period of one year after the Closing Date cooperate with the County in the acquisition of such fully-executed conveyances and other instruments as may reasonably be necessary to provide the County free and clear legal access to the Assets.

f) No Litigation. There is no pending, and, to the best of Association's knowledge, no threatened litigation, action, proceeding or investigation by or before any court, arbitrator, governmental body or agency involving the Association or the Water System.

g) Third-Party Approvals. The Association shall have obtained all legally required third-party approvals, if any, required under Section 3.2(e) above.

h) Defeasance. As of the Closing Date, all mortgages, liens and security interests associated with the Assets will be removed, subject to Section 1.6(c) and Section 1.7(b)).

i) City Approval of Additional Point of Delivery. The City must approve its existing water delivery point to the Association as an additional point of delivery to the County without requiring any infrastructure improvements or imposing other conditions of approval; provided, however, that the County may, but shall not be required to, agree to make infrastructure improvements or accept conditions of approval, the decision to do so being entirely within the County's discretion. The Association acknowledges and agrees that the County is

under no obligation to contest or challenge the City's decision to approve, approve with conditions, or disapprove the additional point of delivery and that the County's decision to make infrastructure improvements required by the City or accept other conditions of approval is not subject to challenge by the Association in any way.

j) Membership Approval. The Association membership shall have approved this Agreement in accordance with the Association bylaws.

4.2 Conditions Precedent to the Association's Obligations

The obligation of the Association to consummate the transactions contemplated by this Agreement is subject to the satisfaction, on or prior to the Closing Date, of each of the following conditions (any one or more of which may be waived in writing, in whole or in part, by the Association, in its sole discretion):

a) Representations and Warranties. The County's representations and warranties contained in this Agreement shall be true in all material respects as of the Closing Date, except for changes in the ordinary course of business after the date first written above that are in conformity with the covenants, warranties, representations and agreements contained in this Agreement.

b) Performance of Agreements. The County shall have performed and complied, in all material respects, with all covenants, agreements and conditions required by this Agreement to be performed or complied with by it prior to or upon the Closing Date.

c) Deliveries. The County shall have delivered the documents and other items described in or required by this Agreement.

e) No Litigation. There is no pending, and, to best of the County's knowledge, no threatened litigation, action, proceeding or investigation by or before any court, arbitrator, governmental body or agency which shall seek to restrain, prohibit or invalidate the transactions contemplated hereby or which, if adversely determined would result in a breach of a representation, warranty or covenant of either party herein.

f) Third-Party Approvals. The County shall have obtained all legally required third-party approvals, if any, required under Section 3.3 above.

h) Membership Approval. The Association membership shall have approved this Agreement in accordance with the Association bylaws.

ARTICLE 5.

Termination

5.1 Termination

This Agreement may be terminated as follows and in each case only by written notice:

- a) by the mutual written consent of the Association and the County;
- b) by either Party if the transaction under this Agreement has not closed by the first anniversary of this Agreement, provided that the Party seeking to terminate under this provision shall not be in material breach of the Agreement;
- c) by either Party for material breach of this Agreement if such breach has not been (i) cured within thirty (30) days after the non-breaching party gives written notice of breach to the breaching party and the non-breaching party has not expressly waived its right in writing to enforce the provision at issue;
- d) by the County, if any of the conditions precedent in Section 4.1 of this Agreement have not been satisfied as of the Closing Date, provided that such non-satisfaction was not caused by the County's material breach of this Agreement and provided further that the County has not expressly waived such condition in writing on or before the Closing Date; and
- e) by the Association, if any of the conditions precedent in Section 4.2 of this Agreement have not been satisfied as of the Closing Date, provided that such non-satisfaction was not caused by the Association's material breach of this Agreement and provided further that the Association has not expressly waived such condition in writing on or before the Closing Date.

**ARTICLE 6
(RESERVED)**

**ARTICLE 7.
Survival**

7.1 Survival

All covenants, warranties, representations and agreements made by the Parties in this agreement or in any exhibit, document, statement, certificate or resolution furnished in connection with the transaction contemplated by this Agreement shall survive the Closing Date.

7.2 Limitations on Survival

- a) The covenants, warranties, representations and agreements set forth in Section 3.1(c) and Section 3.4 of this Agreement shall survive the Closing Date for an unlimited period of time.
- b) The covenants, warranties, representations and agreements set forth in Section 2.1, Section 3.1(a) through (b) of this Agreement shall survive the Closing Date for a period of one (1) year.

**ARTICLE 8.
Miscellaneous**

8.1 Exhibits

All Exhibits attached to in this Agreement are hereby incorporated in and made a part of this Agreement by reference as if set forth in full herein.

8.2 Entire Agreement

This Agreement constitutes the entire agreement between the parties concerning the Association's conveyance of the Assets to the County; and this Agreement supersedes all prior oral or written agreements, understandings, representations and warranties, and courses of conduct and dealing between the Parties on the subject matter hereof.

Amendment

This Agreement may be amended or modified only by a writing executed by the County and the Association.

8.4 Extension or Waiver of Performance

Either the Association or the County may extend the time for or waive the performance of any of the obligations of the other, waive any inaccuracies in the warranties or representations by the other, or waive compliance by the other with any of the covenants, conditions or agreements contained in this Agreement, provided that any such extension or waiver shall be in writing and signed by the waiving party in the case of a waiver, or by both the Association and the County in the case of an extension.

8.5 Assignment and Delegation

Neither party may assign or delegate its duties, rights and obligations under this Agreement except upon the express written consent of the other party; *provided*, however, that nothing in this Agreement precludes the County from selling all or part of the Assets to another governmental or public utility or requires the County to obtain the Association's written consent to do so; and *provided further* that the Board of County Commissioners hereby delegates to the County Manager the authority to sign and execute all instruments that may be required or appropriate to execute the County's rights and obligations under this Agreement. Any attempted assignment or delegation without the express written consent of the other party, when required, is void and of no force or effect.

8.6 Successors and Assigns; Binding Effect

This Agreement shall be binding upon, and inure to the benefit of, the parties and their respective successors and assigns.

8.7 Governing Law and Venue

This Agreement shall be governed by and construed under the substantive laws of the State of New Mexico, without regard to its choice of law principles. The First Judicial State District Court, Santa Fe County, New Mexico, shall be the exclusive venue for any litigation regarding this Agreement.

8.8 Notices

All notices provided for in this Agreement shall be in writing, addressed to the Association or the County, as the case may be, at the addresses set forth in this Paragraph and may be (a) delivered in person; (b) sent by United States registered or certified mail, return receipt requested; (c) sent by recognized overnight courier or delivery service from which a receipt may be obtained; or (d) sent by facsimile or telefax transmission during regular business hours (9 a.m. to 5 p.m., Monday-Friday, excluding weekends and holidays observed by Santa Fe County).

To the Association: Hyde Park Estates Cooperative Domestic Water Users Association,
Inc.
Thomas P. Alesi, President
2000 Paseo Primero
Santa Fe, NM 87501

With copy to: Holland & Hart, LLP
Attn: Mark F. Sheridan & Kylie J. Crandall
110 N. Guadalupe, Suite I
PO Box 2208
Santa Fe, NM 87504

To the County: Santa Fe County Manager
Santa Fe County
102 Grant Avenue
Santa Fe, New Mexico 87504
Facsimile: (505) 995-2740

With copy to: Santa Fe County Utilities Director
424 New Mexico Highway 599 Frontage Road
Santa Fe, New Mexico 87507
Facsimile: (505) 995-2740

The Parties shall have the right to designate different addresses, individuals, and facsimile numbers for the receipt of notice by written notice to the other Party as provided in this Section 8.8.

Notices given in accordance with this Section 8.8 shall be deemed given on the day of delivery, if delivered in person; five days after being mailed, if sent by U.S. mail; the next day, if sent by overnight courier or delivery service; or on the date of facsimile or telefax transmission, if

transmitted by facsimile or telefax during the hours and on the days specified above, and otherwise on the next business day.

8.9 Captions

The headings and captions used with the subsections, sections, articles and schedules of this Agreement are for convenience or reference only and shall not be deemed to modify or limit the provisions of this Agreement.

8.10 Construction

In the event any ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the parties and no presumption or burden of proof shall arise favoring or disfavoring either party by virtue of the authorship of any of the provisions of this Agreement.

Any reference to any federal, state, local or foreign law shall be deemed to refer to all amendments, as well as to all rules and regulations promulgated thereunder, unless the context requires otherwise.

Words used herein, regardless of the number and gender specifically used, shall be deemed and construed to include any other number, singular or plural, and any other gender, masculine, feminine or neuter, as the context may require. The word "including" shall mean "included," without limitation.

8.11 Cumulative Remedies

The remedies afforded in this Agreement are cumulative to each other and to all other remedies provided by law.

8.12 No Waiver

Except as otherwise provided herein, no delay of or omission in the exercise of any right, power or remedy accruing to any party as a result of any breach or default by any other Party under this Agreement shall impair any such right, power or remedy; nor shall it be construed as a waiver of or acquiescence in any such breach or default, or any similar breach or default occurring later; nor shall any waiver of a single breach or default be deemed a waiver of any other breach or default occurring before or after that waiver.

8.13 Time of the Essence

Time is of the essence in this Agreement.

8.14 Third Party Beneficiaries

Nothing herein expressed or implied is intended or should be construed to confer upon or give to any person, other than the Parties, any rights or remedies under or by reason of this Agreement.

8.15 Counterparts

This Agreement may be executed in any number of counterparts, each of which shall be an original, but all of which shall constitute one and the same instrument. This Agreement shall be binding upon the parties only when a copy or a counterpart has been signed by each party and delivered to each other party. Signatures, copies and counterparts may be transmitted by mail, facsimile or overnight courier service and when so transmitted are as effective as if a manually-signed, original document had been delivered.

8.17 Indemnification; Removal of Clouds on Title; Right of Rescission.

a) Indemnity. Upon the County's written demand made within one year after the Closing Date, the Association shall defend, indemnify, and hold harmless the County, its officers, employees, and agents against any and all claims, suits, actions, appeals, costs, counsel fees, expenses, damages, judgments and decrees arising out of or relating to this Agreement, including but not limited to claims, suits, actions, and appeals (collectively, "Suits") challenging the validity of this Agreement, alleging trespass or a taking by the County, or otherwise challenging the County's legal title to or right to access, operate, maintain, repair, or replace any part the Assets; *provided*, however, that the Association's duty of indemnity under this Section shall be limited to Suits brought by residents of Hyde Park Estates. The County shall have no obligation under this Agreement to exercise its power of eminent domain.

b) Removal of any Cloud on Title. If the County within one year after the Closing Date provides the Association a written description of any material cloud on the County's right, title or interest in or to the Assets, the Association shall at its sole expense take all appropriate actions to expeditiously remove such cloud(s), which actions may include but are not limited to acquiring deeds or other conveyances from third parties, enforcing existing agreements, or filing suit to quiet title.

c) Association's Right of Rescission. The Association shall have the right to rescind this Agreement in lieu of performing its obligations under Section 8.17(b) above.

d) The County's Right of Rescission. The County shall have the right to rescind this Agreement if the Association refuses to perform its obligations under Sections 8.17(a) or 8.17(b) or if a court of competent jurisdiction determines in a suit brought within one year after the Closing Date that this entire Agreement is invalid or the County lacks the right, title or interest to own, access, or operate a material part of the Assets.

e) Return of the Status Quo Ante. Within six months after either the Association or the County exercising their right of rescission, the Parties shall take all necessary and appropriate actions to return the Parties to the status quo ante existing prior to execution of this Agreement, which actions may include but are not limited to re-conveyance of the Assets and return of funds paid under this Agreement.

8.18 Limitation on County Liability

a) The County's liability under this Agreement and any grant, Assumed Contract, license, or other instrument assigned by the Association to the County pursuant to this Agreement shall be limited to that which is consistent with the County's sovereign immunity and the limitations imposed on county liability under state law, including but not limited to the Bateman Act, NMSA 1978, Section 6-6-11, the New Mexico Tort Claims Act, NMSA 1978, Sections 41-4-1 through 41-4-30, and the Anti-Donation Clause of the New Mexico Constitution, N.M. Const. article 9, section 14.

b) The County shall not be bound by any agreement or grant that obligated the Association to provide water to any person or perform any other service for free or at a discounted rate or fee.

c) The Association has provided notice and explained the terms and conditions of this Agreement to its board and customers, including this Section 8.18, and the Association's board and customers shall be bound by this Agreement.

SANTA FE COUNTY

By: _____
Anna T. Hamilton,
Chair, Board of County Commissioners


Date: _____

ATTEST:

Geraldine Salazar, Santa Fe County Clerk

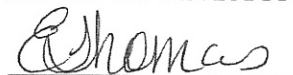
Date: _____

APPROVED AS TO FORM:


R. Bruce Frederick, Santa Fe County Attorney

Date: 3-18-19

FINANCE DIVISION APPROVAL:


Erika D. Thomas, Interim Director

Date: 3-20-19

HYDE PARK ESTATES COOPERATIVE DOMESTIC WATER ASSOCIATION

By: _____
Name:
Title:

Date: _____

ATTEST:

Name:
Title: Secretary

Date: _____

APPROVED AS TO FORM:

Attorney for the Association

Date: _____

[Association Acknowledgment on following page]